

## Notice of Rulemaking Hearing

### Tennessee Department of Labor and Workforce Development

#### Chapter 0800-06-01 Non-Smoker Protection Act Rules

There will be a hearing before the Commissioner of the Department of Labor and Workforce Development to consider the promulgation of new rules pursuant to Public Chapter 410 of the Public Acts of 2007 also known as The Non-Smoker Protection Act to be codified at Tennessee Code Annotated, Title 39, Chapter 17, Part 18. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-204 and will take place in the First Floor Hearing Room in Building A of the Tennessee Department of Labor and Workforce Development located at 220 French Landing Drive, Nashville, Tennessee 37243-1002 at 9:30 A.M. Central Time on the 15<sup>th</sup> day of November, 2007.

Any individuals with disabilities who wish to participate in these proceedings (review these filings) should contact the Department of Labor and Workforce Development, Civil Rights, Diversity, and Compliance Assistance Section to discuss any auxiliary aids or services needed to facilitate such participation or review. Such initial contact may be made no less than ten (10) days prior to the scheduled meeting date (the date such party intends to review such filings), to allow time for the Department to determine how it may reasonably provide such aid or service. Initial contact may be made with the ADA Coordinator at Andrew Johnson Tower, 8<sup>th</sup> Floor, 710 James Robertson Parkway, Nashville, Tennessee 37243-6779, (615) 741-8805 or (800) 848-0299.

For a copy of this notice of proposed rules, contact: Daniel A. Bailey, General Counsel, 220 French Landing Drive, Nashville, TN 37243-1002, (615) 741-9550.

### Substance of Proposed Rules

#### New Rules

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0800-06-1-.01 Purpose.

- (1) The Non-Smoker Protection Act ("Act") requires that on and after October 1, 2007, smoking be prohibited in all enclosed public places within the State of Tennessee. It is the purpose of these rules to supplement the provisions of that Act and provide the mechanisms by which the Department of Labor and Workforce Development ("Department") shall implement the enforcement duties placed upon it by Section 1 of Chapter 410 of Public Acts of 2007.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.02 Public Places Regulated.

- (1) The Department shall be responsible for all enforcement activities required by the Act in all enclosed public places not regulated by the Department of Health.
- (2) The Department of Health shall be responsible for the enforcement activities required by the Act in the following enclosed public places:
  - (a) All health care facilities licensed, permitted or certified pursuant to Tennessee Code Annotated, Title 68, Chapter 11; and
  - (b) All enclosed public places for which a license, permit or certification must be obtained from any health related board assigned to the Department of Health's Division of Health Related Boards pursuant to Tennessee Code Annotated, 68-1-101 before a health related profession may be practiced therein; and
  - (c) All enclosed public places for which a license, permit or certification must be obtained from the Department of Health's Division of Emergency Medical Services; and
  - (d) All other enclosed public places over which the Department of Health has regulatory authority pursuant to Tennessee Code including, but not limited to, the following:
    1. Restaurants
    2. Indoor swimming pools
    3. Food Service Establishments
    4. Hotels
    5. Bed and Breakfasts
    6. Fast Food Establishment
    7. Primary Health Care Centers
    8. County and District Health Departments
    9. Tattoo and Body Piercing Parlors
    10. Organized Camps
- (2) For enforcement purposes as to the establishments listed above that choose to be an "age-restricted venue", and consistent with the liberal construction required pursuant to Section 3 of Chapter 410 of the Public Acts of 2007, the twenty one (21) years of age requirement contained in the definition of "age-restricted venue," set forth in Section 1 of Chapter 410 of Public Acts of 2007, is intended to apply also to employees of such venues.
- (3) To the extent that the Department has concurrent jurisdiction over those enclosed public places identified above, all documentation of violations of the Act created or collected by the Department during its normal inspection or regulatory duties may be forwarded to the Department of Health for processing and disposition.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.03 Signage.

- (1) The "No Smoking" signs or the international "No Smoking" symbol required by Section 1 of Chapter 410 of Public Acts of 2007 to be posted at every entrance to every public place and place of employment where smoking is prohibited shall be clearly and conspicuously placed at a height, location and in such a size as to be easily seen by a person with normal vision entering the establishment and shall not be obscured in any way.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.04 Violations.

- (1) During its routine inspections, investigations or other required regulatory activities in the enclosed public places under its jurisdiction, or in response to complaints of violations of the Act occurring in any of those enclosed public places, the Department shall document and collect necessary information on any of the following listed violations of the Act:
  - (a) Any persons knowingly smoking in a place where it is prohibited; or
  - (b) Any owners, managers, operators or persons who otherwise control a public place who knowingly fail to do any of the following:
    1. Communicate the smoking prohibition to existing and prospective employees. For purposes of enforcement of this rule, the existence of a written policy, handout or statement for distribution to all employees and prospective employees or a sign posted in any area(s) necessarily frequented by all employees either or both of which communicates the smoking prohibition constitutes compliance; and/or
    2. Post no smoking sign or the universal no smoking symbol at every entrance to the public place as required by Section 1 of Chapter 410 of Public Acts of 2007 and rule 0800-06-01-.03; and/or
    3. Either themselves or through their employees inform any person violating the Act of the appropriate provisions of the law.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.05 Complaints.

- (1) Any person wishing to file a complaint against any person or public place where smoking is prohibited for not complying with the provisions of this Act may do so in one of the following ways:
  - (a) By a telephone call to the Department; or
  - (b) By submitting a complaint via the Internet; or
  - (c) In writing to the Department.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.06 Penalties.

- (1) A person who knowingly smokes in an area where smoking is prohibited by the provisions of the Act shall be subject to a civil penalty of fifty dollars (\$50).
- (2) A person who owns, manages, operates or otherwise controls any public place where smoking is prohibited pursuant to the provisions of the Act and who knowingly fails to comply with any provision of the Act shall be subject to the following:
  - (a) For a first violation in any twelve-month period, a written warning from the Department, as appropriate;
  - (b) For a second violation in any twelve-month period, a civil penalty of one hundred dollars (\$100); and
  - (c) For a third or subsequent violation in any twelve-month period, a civil penalty of five hundred dollars (\$500).
- (3) Each day on which a knowing violation of the Act occurs shall be considered a separate and distinct violation.
- (4) The Department may, in those instances when a reported violation cannot be substantiated, issue advisory letters to the public place wherein the violation was alleged to have occurred.

Authority: 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.07 Enforcement Process, Appeals and Payment of Penalties.

- (1) Upon receipt of verification of a violation of the Act the Department shall issue a written notice to the offender of the violation and the penalty applicable to the violation. The written notice may be issued by certified mail, delivery service, or personal service.
- (2) Any person receiving a notice of violation and penalty who wishes to contest the determination of the violation and/or the assessment of the penalty must, within ten (10) business days of receipt of the notice, file a written request for an appeal with the Department.
- (3) Any request for an appeal timely received by the Department shall be conducted pursuant to the provisions of the Uniform Administrative Procedures Act compiled at Tennessee Code Annotated, Title 4, Chapter 5 and the Administrative Procedures Division of the Secretary of State's rules governing contested case proceedings compiled at Chapter 1360-4-1.
  - (a) In contested cases pursuant to this rule, the Department shall have the burden of proof by a preponderance of the evidence to establish that a person violated the Act.
- (4) Civil Penalty Payments
  - (a) Any person who is assessed a civil penalty pursuant to the Act who does not timely file an appeal of that assessment must pay such civil penalty on or before the thirtieth (30th) day after receipt of the notice of violation and penalty.

- (b) If the assessed civil penalty is timely appealed, the assessed penalty must be paid no later than thirty (30) days after the date of a final order affirming the assessed penalty.
- (c) Payment of any civil penalty shall be made by check or money order made payable to "Treasurer, State of Tennessee" and mailed or delivered in person to the Department.

Authority: T.C.A. §§ 4-5-102(3), Tenn. Const. Art. 1 § 8; 2007 Tenn. Pub. Acts ch. 410.

0800-06-01-.08 Copy Costs.

- (1) Information gathered under or generated pursuant to the Act or rules promulgated pursuant thereto shall, pursuant to the Public Records Act, be made available to any citizen of the State of Tennessee upon request and payment of a fee in the amount of twenty-five cents (\$0.25) per page.
- (2) Payment of fees set forth in this rule shall be by check or money order made payable to "Treasurer, State of Tennessee." Fees must be prepaid before requested information is sent. Payment of fees in cash shall not be accepted by the Department.

Authority: 2007 Tenn. Pub. Acts ch. 410, T.C.A. §§ 10-7-503 and 10-7-506.

The notice of rulemaking set out herein was properly filed in the Department of State on the 28th day of September, 2007. (FS 09-46-07; DBID 736)